

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Ngoc Anh Tran

CASE NUMBER: 1817654

HOME AFFAIRS REFERENCE(S): BCC2016/4393033

MEMBER: Helena Claringbold

DATE: 31 March 2022

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2)(a) of Schedule 2 to the Regulations; and
- cl 820.221 of Schedule 2 to the Regulations.

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31 March 2022 at 3:33 pm

Statement made on

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CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, social and household aspects of relationship – nature of commitment – statutory declarations and documentary evidence – decision under review remitted

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1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221

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LEGISLATION

*Migration Act 1958 (Cth), ss 5F(2), 65
Migration Regulations 1994 (Cth), r*

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. On 29 December 2016, Mr Ngoc Anh Tran, the applicant, applied for a Partner (Temporary) (Class UK) visa. The application was based on his spousal relationship with Ms Thi Huong Giang Nguyen, the sponsor.
2. On 7 June 2018, a delegate of the Minister for Home Affairs refused to grant the visa. The delegate was not satisfied that the applicant and the sponsor are genuine spouses. Therefore, the applicant did not meet cl. 820.211(2)(a), cl. 820.211 and cl.820.221 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) made under the *Migration Act 1958* (the Act). On 16 June 2018, the applicant lodged an application for review with the Tribunal. This is a review of the delegate's decision brought by the applicant. On 18 March 2022, the applicant provided the Tribunal with a copy of the delegate's Decision Record.
3. On 19 June 2018, The Tribunal wrote to the applicant and advised of the following:
 4. If he wished to provide material or written arguments for us to consider, he should do so as soon as possible including a statement explaining why he disagreed with the Department's decision and to do so as soon as possible.
 5. He should provide an English translation by an accredited translator of any document written in other languages and provide both documents to the Tribunal.
6. On 9 March 2022, the Tribunal wrote to the applicant and invited him to a hearing set down for 29 March 2022. He was advised the following:
 7. Please provide all documents he intends to rely on to support your case by 22 March 2022. The decision made by the department should set out the reasons for the decision, and he should have regard to these, and any changes in his circumstances, in providing documents and preparing for the hearing. Any documents or written arguments sent to the Tribunal should be in English and if not then accompanied by a translation from a qualified translator.
 8. Statements written in Australia by the applicant and the sponsor and third-party statements are to be provided as statutory declarations. The statutory declarations must be correctly witnessed and accompanied with identification documents for the authors, for example a certified copy of the person passport or birth certificate.
 9. Statutory declarations and third-party statements written by persons who do not write and understand the English language, are to be written in the persons' own language.
 10. Documents not written in English must be translated into English by a translator with a current 'Translator' level certification and accreditation from the National Accreditation Authority for Translators and Interpreters (NAATI) who is independent and not involved in or associated with the case under review. This includes any documents or information that the applicants consider relevant to their review that are on the Department of immigration and Border Protection's case file and/or the Department of Home Affairs' case file and the Tribunal's case file.
 11. The foreign language certified statements and the English translated certified statements are to be provided to the Tribunal. The statements must be correctly witnessed and accompanied with identification documents for the authors, for example a certified copy of the person passport or birth certificate.

12. Translations provided by non-certified translators outside of Australia should be endorsed by the translator with their full name, address, telephone number and details of their qualifications and experience in the language being translated.

13. Should telephone, chat and/or message records be provided to the Tribunal, clearly identify information that relates to the financial aspect of the parties' relationship and the nature of their household and the social aspects of their relationship and the nature of their commitment to each other and explain why the information is relevant to these aspects of the parties' relationship. In addition, where there is information relating to these aspects of the relationship, the explanation of its relevance to be placed directly underneath the information. Independent information identifying the holders of the accounts to be provided. The messages are to be clearly identified by the independent messaging platform with the original message provided. If the messages are in a language other than English they need to be translated into English by a translator with a current 'Translator' level certification and accreditation from the National Accreditation Authority for Translators and Interpreters (NAATI) who is independent and not involved in or associated with the case under review.

14. On 29 March 2022, the applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal was assisted by the services of an interpreter in the Vietnamese and English languages. The applicant was represented in relation to the review.

15. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The Tribunal has taken into consideration, individually and completely, all of the evidence in the Department of Home Affairs' (the Department's) case file and the Tribunal's case file and the evidence at the Tribunal hearing.

17. ISSUE

18. The issue in the present case is whether, the applicant is the spouse of the sponsor at the time of application and the time of decision as defined in s. 5F of the Act.

19. BACKGROUND ON THE EVIDENCE

20. The applicant was born in 1995 in Kien An, Phu Lien, Hai Phong, Vietnam. The applicant's parents and one brother reside in Vietnam. The applicant declared no previous relationship.

21. The sponsor was born in 1992 in Hai Phong, Vietnam. The sponsor's parents and two siblings reside in Vietnam. The applicant declared a previous marriage to Mr Viet Ha Tran from 6 August 2010 until their divorce on 16 April 2016. On 21 August 2020, she became an Australian citizen by grant.

22. On 1 July 2016, the parties met for the first time. On 10 December 2016, the parties married in New South Wales, Australia.

23. Is the applicant the de facto partner of an eligible person?

24. The Tribunal is satisfied that the sponsor, at the time of visa application and decision, was an Australian citizen who had turned 18.

Are the parties validly married?

25. At the time the visa application was made the applicant provided evidence of her marriage to the sponsor. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the parties in a spousal relationship?

26. 'Spouse' is defined in s. 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
27. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsor's household and their commitment to each other as set out in reg.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the other requirements for a spousal relationship met?

The financial aspects of the parties' relationship

28. In a statutory declaration dated 18 October 2021 the applicant provided information including the following:
- The parties have a Commonwealth Bank joint account. When he was working his salary was deposited into the account and now the sponsor's salary is deposited into the bank account. They use the bank account to pay their rent and bills and for their everyday spending. They have a joint lease for their rental property and advised the Australian Taxation Office (ATO) and superannuation funds about their relationship. In the sponsor's statutory declaration dated 16 December 2021, she provided the same information as given by the applicant in his statutory declaration dated 18 October 2021. In addition, she stated that both of their wages go into their joint bank account.
 - Commonwealth Smart Access joint bank statements for account ending 2800 are dated from 2016 to 2021. They record numerous credit transactions for the parties' salaries and more recently for the sponsor's salary. They also record numerous transactions relating to the repayment of loans to the sponsor. Debit transactions are noted for the following, rent, utilities, loans to other people, investment in shares in the stock exchange and ad hoc expenditure, a New South Wales rental bond payment in 2019, purchases for whitegoods and furniture items.
 - A Residential Tenancy Agreement has been provided for the Bankstown address starting on 5 October 2016 and ending on 4 October 2019 and for the Casula address starting on 29 November 2019 and ending on 28 May 2020. A Trust Account Receipt for \$800 is noted as having been received from the parties and the payment is identified on the parties' joint bank statement. Various printed folios for Australian Super are in the applicant's name noting the sponsor as the applicant's non-binding beneficiary.

- A collection of ATO documents dated 2016 to 2021, have been provided in the applicant's and sponsor's names. The majority of these documents are not signed by the applicant or the sponsor or the agent and the agent's number has not been recorded. ATO documents that are completely signed relate to individual tax returns for the sponsor and the applicant dated 2018. The Tribunal accepts that the applicant and the sponsor have declared each other as their spouses on the 2018 documents. It places little weight that the information in the incomplete ATO documents has been lodged and declared to the ATO, because there is no independent evidence that these documents have been lodged with the ATO.

29. The Tribunal discussed with the applicant the information provided on the ATO website about the procedure for submitting documents as follows:

- When documents are lodged electronically on behalf of clients. Some refunds can be paid by electronic funds transfer (EFT) if the agent is authorised by their client. Taxpayers must sign a declaration before their tax return is filed. Each time the agent lodges an approved form on behalf of their clients, the law requires that they have first received a signed declaration in writing from their client. This requirement includes all approved forms such as activity statements and tax returns.¹

30. The parties' income is derived from their salaries. They share a joint bank account and tenancy agreement for their rental property. Their salaries were deposited into the joint bank account up until 2020. Currently the sponsor's salary is deposited into the joint bank account and the applicant's cash salary is used to pay for expenses. As a result of the COVID-19 pandemic the applicant lost employment for some time and was supported by the sponsor. In December 2021, the applicant began working two to three days a week. The sponsor has run a small business with a business partner for the past five years. The parties do not have any joint ownership of real estate or other major assets or joint liabilities or pool financial resources, especially in relation to major financial assets. They have a legal obligation in respect of each other related to their joint bank account, lease for their rental property. The applicant had a legal obligation in respect of the sponsor relating to his superannuation as detailed above. The Tribunal accepts that the parties pool some financial resources and share day to day household expenses.

The nature of the parties' household

31. The parties have lived together at two addresses. In May 2016 or later in 2016, the applicant rented a granny flat in Casula from the sponsor's aunt. The sponsor moved in to live with the applicant at this address. There is inconsistent information about when this occurred, however, the joint tenancy agreement for the Casula address starts on 5 October 2016. On 10 December 2016, the parties married and continued living at the Casula address. In late 2019, the parties moved to the Casula address. A year later a relative of the sponsor's began living with them as a tenant. The sponsor generally does the cooking and grocery shopping and the applicant assists around the house and does the gardening. The parties do not have any joint responsibility for the care and support of children. The Tribunal accepts that the parties share the responsibility of housework.

The social aspects of the parties' relationship

32. On 17 December 2016, the parties married. They held their wedding reception with 60 guests attending including the sponsor's aunt and her family and the staff at the butchery shop and their friends. In the middle of 2018 and 2019 the parties travelled to Vietnam to

¹When documents are lodged electronically on behalf of clients. <https://www.ato.gov.au/Tax-professionals/Digital-services/In-detail/Practitioner-lodgment-service-user-guide/?page=5>

visit their families and introduce themselves to their friends. During the COVID-19 pandemic they remained in contact with family and friends via telephone. When restrictions eased, they visited their family and friends as time permitted.

33. In translated statements dated 2018 and 2019 the following information is provided by Mr Ngoc Thom Tran and Ms Thi Lien Nguyen. The applicant's parents sought confirmation from local authorities that the applicant and the sponsor visited them in 2018 and 2019. Ms Xuan Ngan Tran who lives in Haiphong City was a high school classmate of the sponsor. On 27 August 2018, the sponsor returned to Vietnam to see her family and friends. On 30 August 2018, she met the sponsor who introduced her to the applicant who invited her to dinner. She witnessed the parties happy and enjoying popular food. Mr Quang Hung To who lives in Haiphong City was a high school classmate of the applicant. On 27 August 2018, the applicant returned to Vietnam to see his family and friends. On 24 September 2018, they went to a café to see the mid-autumn festival. He was introduced to the sponsor and believes that the parties are husband and wife of two years. Mr Thi Kim Oank Nguyen has known the applicant as a classmate for four years and as a high school classmate for three years. On 27 August 2018, the applicant returned to Vietnam with the sponsor. After being introduced to the sponsor he realised that the parties were married. On 25 September 2018, they all went to a café where he could see that the parties were happy. All witnesses declared the parties' relationship to be genuine.
34. Various travel and accommodation documents have been provided for the parties' travel in 2018 and 2019. Photographic evidence depicts the parties together and with others at different locations.
35. The Tribunal understands that the parties represent themselves to other people and are viewed as being married to each other. It accepts that the parties plan and undertake joint social activities.

The nature of the parties' commitment to each other

36. The parties met in 2016 when the applicant moved to Cabramatta to work in the butchery shop. In October 2016, the parties held a joint tenancy agreement. On 10 December 2016, the parties married and have lived together in a spousal relationship since their marriage. They would like to have children. However, the sponsor has a medical condition that makes natural conception difficult. She has had three surgeries to correct this issue. The last surgery took place at the end of 2021 and she continues on medication. If she does not become pregnant the parties will undergo IVF treatment to increase her risk of pregnancy. During their time together they have supported each other during times of financial stress, the applicant's unemployment and the difficulties the sponsor experienced in becoming pregnant. They would like the applicant to find full-time employment to enable them to save for the purchase of a property. Throughout their relationship they have remained positive and encouraged each other. The parties primarily provided consistent information about their personal history. The Tribunal accepts that the parties provide each other with companionship and emotional support and that they see their relationship as long term.
37. Overall, the Tribunal is satisfied that the applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others; that their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis. The applicant therefore meets the requirements of s. 5F(2) of the Act. Given these findings, the Tribunal is satisfied that the parties are in a spousal relationship.
38. On the basis of the above the Tribunal is satisfied that the requirements of s. 5F(2) are met at the time the visa application was made and the time of this decision.

39. Therefore, the applicant meets cl. 820.211(2)(a) and cl. 820.221 of Schedule 2 to the Regulations.
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

41. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl. 820.211(2)(a) of Schedule 2 to the Regulations; and
 - cl. 820.221 of Schedule 2 to the Regulations.

Helena Claringbold
Member

42. **ATTACHMENT - Extract from Migration Regulations 1994**

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).